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VIA HAND DELIVERY

August 31, 2007

Marlene H. Dortch, Secretary
 Office of the Secretary
 Federal Communications Commission
 445 12th Street, SW
 Suite 5-C327
 Washington, DC 20554

FILED/ACCEPTED**AUG 31 2007**

Federal Communications Commission
 Office of the Secretary

*Re: Petitions of Qwest Corporation for Forbearance Pursuant to
 47 U.S.C. § 160(c) in the Denver, Minneapolis, -St. Paul,
 Phoenix, and Seattle Metropolitan Statistical Areas, WC
 Docket No. 07-97*

Dear Secretary Dortch:

Enclosed for filing in the above-referenced proceeding are two copies of the REDACTED version of the Opposition of Affinity Telecom, Inc.; Cavalier Telephone, LLC; CP Telecom, Inc.; Globalcom, Inc.; McLeodUSA Telecommunications Services, Inc.; Integra Telecom, Inc.; and TDS Metrocom, LLC and supporting declarations (collectively "Opposition"). This filing is also being submitted in the Commission's Electronic Comment Filing System (ECFS).

Under separate cover and in accordance with the Second Protective Order in this proceeding,¹ Highly Confidential copies of this Opposition are being submitted to you along with Gary Romondino, Jeremy Miller and Denise Coca of the Wireline Competition Bureau.

Also enclosed is an extra copy of this redacted filing, please date stamp and return it to the courier. Should you have any questions about this filing, please contact me.

Sincerely,


Patrick J. Donovan

Enclosure

cc: Janice Myles (all via e-mail)
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¹ *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97, Second Protective Order, DA 07-2293, ¶ 14 (rel. June 1, 2007).*

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**Affinity, Cavalier, CP Telecom
Globalcom, McLeodUSA, Integra, TDS
WC Docket No. 07-97
August 31, 2007**

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054**

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Federal Communications Commission
Office of the Secretary**

In the Matter of)
)
Petitions of Qwest Corporation)
for Forbearance Pursuant to 47 U.S.C. § 160(c)) WC Docket No. 07-97
in the Denver, Minneapolis-St. Paul, Phoenix and)
Seattle Metropolitan Statistical Areas)

**OPPOSITION
OF
AFFINITY TELECOM, INC.
CAVALIER TELEPHONE, LLC
CP TELECOM, INC.
GLOBALCOM, INC.
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
INTEGRA TELECOM, INC.
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SUMMARY

The Commission should take the opportunity presented here to establish a "complete when filed" approach to consideration of BOC forbearance petitions and summarily deny Qwest's Petitions for failure to submit wire center level information. Qwest bears the burden of proof in this proceeding.

In order to reasonably meet statutory forbearance standards, the Commission must (1) consider forbearance at the wire center level, (2) conduct a separate forbearance analysis for each market segment, *viz* mass, SME, and enterprise markets and for each capacity level for which Qwest seeks forbearance; (3) find that sufficient independent facilities-based competition exists in each of the relevant markets which is sufficient to ensure that in the absence of unbundling obligations competition will continue; and (4) find that a viable wholesale market exists on some basis other than an error prone "predictive judgment."

Qwest's overall showing of competition is incoherent because it relies on a crazy quilt of methodologies and approaches such as "communications connections" in the mass market, revenues in the business market, lines provided by CLECs based on projections from white pages listings, and special access competition by voice grade equivalents, that preclude any reasoned findings of competition. Viewed separately, Qwest's various approaches to measuring competition are flawed and unpersuasive because they, for example, consistently fail to provide wire center evidence of independent facilities-based competition, omit Qwest's own presence in the market, do not account for substitution of broadband lines, double count categories of competitors, and treat estimates of future competition as actual present competition. Qwest has

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provided no evidence of actual wire center "coverage" or provision of service by cable operators in the mass, SME, or enterprise markets.

Independent evidence shows that Qwest does not face sufficient competition to warrant forbearance. A survey by Integra Telecom, Inc. shows that there are rarely competitive last mile alternatives in buildings in which Integra has customers. This is consistent with the recent GAO Report showing that ILECs control the vast majority of access lines to buildings, as well as the Commission's own *Local Competition Reports* that show that Qwest controls the great majority of retails lines in states in its region. Evidence and Declarations submitted in this and other proceedings, and the Commission's findings in the *TRRO* show that competitors are rarely able to construct their own last mile loops. A further study by Integra Telecom, Inc. of customer churn shows that cable is not a significant competitive presence.

The Commission may not make a "predictive judgment" that Qwest would make reasonable wholesale offerings in the absence of unbundling obligations in light of the lack of record evidence of independent facilities-based competition or wholesale providers. In addition, Qwest has conclusively refused to negotiate wholesale pricing for voice grade, DS1 and DS3 loops and transport in Omaha proving that the Commission's "predictive judgment" for that market was erroneous.

Because there is insufficient competition to constrain Qwest's anticompetitive conduct, the Commission may not make the requisite findings that regulation is unnecessary to assure reasonable prices, terms, and conditions or to protect consumer or that forbearance would serve the public interest.

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Forbearance would additionally be unlawful because the Commission may not decouple forbearance from UNE impairment, and because the Commission may not reasonably conclude that unbundling obligations have been "fully implemented."

The Commission should deny the Qwest Petitions.

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TABLE OF FREQUENTLY USED SHORT CITATIONS

FCC Decisions

<i>Anchorage Order</i>	<i>Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, FCC 06-188 (rel. Jan. 30, 2007)</i>
<i>AT&T-BellSouth Merger Order</i>	<i>AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189 (rel. Mar. 26, 2007)</i>
<i>Local Competition Order</i>	<i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted)</i>
<i>OI&M Forbearance Order</i>	<i>Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, 18 FCC Rcd 23525 (2003)</i>
<i>Omaha Order</i>	<i>Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) appeal pending, Time Warner Telecom, et al. v. FCC, No. 05-4769 (D.C. Cir.)</i>

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<i>Special Access NPRM</i>	<i>Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, FCC 05-18 (rel. Jan. 31, 2005).</i>
<i>TRO</i>	<i>Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, 18 FCC Rcd 16978 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003), aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n, 125 S. Ct. 313 (2004)</i>
<i>TRRO</i>	<i>Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005), aff'd, Covad Commc'ns Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006)</i>

Other Filings

ACS Petition	Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281 (filed September 30, 2005)
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GAO Report	U.S. GENERAL ACCOUNTABILITY OFFICE, REPORT TO THE TO THE CHAIRMAN., COMMIT- TEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES - TELECOMMUNICATIONS, “FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (November 2006)
McLeodUSA Petition for Modification	Petition of McLeodUSA Telecommunications Services, Inc. for Modification, WC Docket No. 04-223 (filed July 23, 2007)
Petitions	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minnea- polis-St. Paul, Minnesota Metropolitan Statis- tical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statisti- cal Area, WC Docket No. 07-97 (filed Apr. 27, 2007)
Denver Petition	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)
Minneapolis Petition	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minnea- polis-St. Paul, Minnesota Metropolitan Statis- tical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)
Phoenix Petition	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix,

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	Arizona Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)
Seattle Petition	Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area, WC Docket No. 07-97 (filed Apr. 27, 2007)

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**OPPOSITION
OF
AFFINITY TELECOM, INC.
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CP TELECOM, INC.
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MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
INTEGRA TELECOM, INC.
TDS METROCOM, LLC**

Affinity Telecom, Inc.; Cavalier Telephone, LLC; CP Telecom, Inc.; Globalcom, Inc.; McLeodUSA Telecommunications Services, Inc.; Integra Telecom, Inc.; and TDS Metrocom, LLC (together “Commenters”) submit this Opposition to the above-captioned Petitions of Qwest Corporation requesting forbearance from regulatory obligations in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs.¹

¹ *Pleading Cycle Established for Comments on Qwest’s Petitions for Forbearance in the Denver, Minneapolis-St.Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Public Notice, DA 07-2291 (rel. June 1, 2007). *Wireline Bureau Grants Extension of Time to File Comments on Qwest’s Petitions for Forbearance in the Denver, Minneapolis-St.Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Public Notice, DA 07-3042 (rel. July 6, 2007).

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August 31, 2007**

**I. THE COMMISSION SHOULD ESTABLISH A “COMPLETE WHEN FILED”
POLICY FOR CONSIDERATION OF BOC FORBEARANCE PETITIONS**

The Commission should take the opportunity presented by Qwest’s Petitions to establish a “complete when filed” policy similar to that established for consideration of BOC section 271 applications for authority to offer interLATA services in a state.² That policy required applications to “include all of the factual evidence on which the applicant would have the Commission rely in making its findings.”³ The Commission should only permit Qwest to submit new evidence “solely to rebut arguments made or facts submitted by other commenters,” and should be prohibited from making “any part of its initial prima facie showing for the first time in reply comments or in ex parte submissions.”⁴

As with Section 271 applications, petitions for forbearance are subject to time sensitive statutory deadlines. Therefore, the Commission’s rationale to establish this rule for 271 applications applies equally to forbearance proceedings. As the Commission explained, “it is highly disruptive ... to have a record that is constantly evolving.”⁵ This rationale flows from the princi-

² *Updated Filing Requirements for Bell Operating Company Applications under Section 271 of the Communications Act*, Public Notice, 16 FCC Rcd 6923, at 3-4 (2001).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

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ple that the Commission “need not sift pleadings and documents to identify” arguments and facts that are not “stated with clarity.”⁶

As explained in the *Omaha Order*, the Commission is “under no statutory obligation to evaluate [the] Petition other than as pled.”⁷ The Commission should therefore impose the same “complete when filed” standard on forbearance petitions as it did on Section 271 applications.⁸

As discussed in this Opposition, Qwest has omitted essential information on wire center level “coverage” by independent facilities-based providers that the Commission has said is the only basis for Section 251(c)(3) forbearance. Qwest is abusing the Commission’s deliberative processes by filing a half-baked case and then hoping that the Commission will shoulder the burden of assembling wire center information for it. This approach makes its initial filing a waste of the Commission’s and interested parties’ time and resources. The Commission is under no obligation to rule on Qwest’s application other than as filed. The Commission should summarily deny the Petitions for failure to submit wire center level information.

⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) *cert. denied*, 409 U.S. 1027 (1972).

⁷ *Omaha Order*, ¶ 61 n.161.

⁸ Petitions for forbearance should be required to contain all information necessary for the Commission to complete its review or the petition would be subject to dismissal. As with Section 271 applications, petitions for forbearance are subject to a statutory deadline and a complete when filed policy would promote efficient decision making by the Commission and efficient participation by interested parties. As with Section 271 applications, dismissal should be without prejudice, affording the petitioner an opportunity to file a more complete case in a subsequent petition and thereby restart the statutory clock.

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The prongs “are conjunctive,” meaning that “[t]he Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.”¹²

As the petitioner, Qwest has the burden of proof in this proceeding and must demonstrate that its forbearance request fully satisfies the statutory standards. The Commission has explained that in “pursuing relief through the vehicle of forbearance ... the Petitioner [has] the obligation to provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards.”¹³ A petitioner must present a detailed showing of the services and facilities for which and the statutory and regulatory provisions from which it seeks forbearance.¹⁴

As explained in succeeding sections of this Opposition, Qwest has failed to meet its burden in numerous respects.

¹² *In re Core Commu'ns., Inc.*, 455 F.3d 267 (D.C. Cir. 2006), *quoting Cellular Telecomms. & Internet Ass'n v FCC*, 330 F.3d 502, 509 (D.C. Cir. 2001).

¹³ *Petition for Forbearance From E911 Accuracy Standards Imposed On Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(h)*, Order, 18 FCC Rcd 24648, ¶ 24 (2003) (rejecting claim that petitioners' burden in a forbearance petition is “lower” than the burden applicable in a waiver petition); *see also Core*, 455 F.3d at 279 (stating that the FCC found that the Petitioner provided “no evidence” in support of arguments for forbearance); *Policy and Rules Concerning the Interstate Interexchange Marketplace*, Memorandum Opinion and Order, 14 FCC Rcd 391, ¶ 28 (1998) (denying forbearance because “petitioners have not met their burden with respect to the first and second prongs of the forbearance standard.”); *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934 as Amended*, Memorandum Opinion and Order, 15 FCC Rcd 7066, ¶ 7 (petitioner “must explain” benefits of forbearance).

¹⁴ *Omaha Order*, ¶ 16 (rejecting forbearance request because the Petitioner failed to identify specific regulations or to explain how they meet certain section 10 criteria).

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II. QWEST HAS THE BURDEN OF PROOF

Section 10(a) states that the FCC “shall forbear from applying any regulation or any provision [of the Act] ... to a telecommunications carrier or telecommunications service” if it determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations, by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁹

In making the determination under subsection (a)(3), the FCC must “consider whether forbearance from enforcing the provision ... will *promote competitive market conditions*, including the extent to which such forbearance will *enhance competition* among providers of telecommunications services.”¹⁰ All three prongs of this standard must be afforded a plain meaning interpretation¹¹ and must be satisfied before the Commission grants a petition for forbearance.

⁹ 47 U.S.C. § 160(a)(1)-(3).

¹⁰ *Id.*, § 160(b) (emphasis added); *see also AT&T v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (quoting same).

¹¹ *AT&T v. FCC*, 452 F.3d at 836 (rejecting the Commission’s “new rule” that “conflicts with the statute’s plain meaning”).

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III. THE COMMISSION MUST APPLY FORBEARANCE STANDARDS THAT REASONABLY IMPLEMENT THE ACT

As noted, forbearance under Section 10(a) is only appropriate if the petitioner can demonstrate that a regulation or provision of the Act is no longer “necessary to ensure that the charges ... for [its] ... telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.”¹⁵ The Commission may grant forbearance only where forbearance “will promote competitive market conditions.”¹⁶ The Commission’s forbearance analysis must “includ[e] the extent to which such forbearance will enhance competition among providers of telecommunications services.”¹⁷

As explained in more detail below, in order to reasonably meet these statutory requirements, the Commission must (1) consider forbearance at the wire center level, (2) conduct a separate forbearance analysis for each market segment, *viz* mass, small business, and enterprise markets and for each capacity level – DS0, DS1, and DS3 – for which Qwest seeks forbearance; (3) find that sufficient independent facilities-based competition exists in each of the relevant markets which is sufficient to ensure that in the absence of unbundling obligations competition will continue;¹⁸ and (4) find that a viable wholesale market exists on some basis other than an error prone “predictive judgment.”

¹⁵ 47 U.S.C. § 160(a)(1).

¹⁶ *Id.*, § 160(b).

¹⁷ *Id.*

¹⁸ *Omaha Order*, ¶ 1; *Anchorage Order*, ¶¶ 27-30.

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Wire Center Level Analysis. As the Commission found in the *Omaha Order* and later reiterated in the *Anchorage Order*, “it is appropriate for [the Commission] to use the wire center service area as the relevant geographic market.”¹⁹ Thus, the Commission should exercise its authority to forbear from Section 251(c)(3) *only* when, and to the extent, that a Petitioner has provided sufficient, probative evidence on a wire center basis. The Commission has already “considered and rejected the idea of measuring facilities-based coverage on an MSA basis” in this context, and found that “[u]sing such a broad geographic region would not allow [the Commission] to determine precisely where facilities-based competition exists, which are the only locations in which [it has] determined that the forbearance criteria of section 10(a) are satisfied with respect to section 251(c)(3) unbundling obligations.”²⁰ Forbearance from such obligations is only appropriate “when the evidence ... is presented on a basis that allows [the Commission], in an administrable fashion and consistent with the Commission’s precedent, to make findings on a wire center basis”²¹ as it did in the *TRRO*.²²

Accordingly, the Commission must assess Qwest’s Petitions using a geographic market that is no broader than individual wire centers. However, as discussed later in these comments,

¹⁹ *Omaha Order*, ¶¶ 61-62; *Anchorage Order*, ¶ 14.

²⁰ *Omaha Order*, n.186; *see also Anchorage Order*, ¶ 15.

²¹ *Omaha Order*, n.61.

²² *TRRO*, ¶ 82 (rejecting proposals that conclusions be made on an MSA basis), ¶ 87 (basing transport impairment on a wire center-based test), ¶ 155 (finding that the geographic area served by a wire center is the appropriate geographic market to determine impairment), ¶ 164 (rejecting proposals that impairment of high-capacity loops be determined based on MSAs).

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Qwest has failed to submit any wire center level information concerning independent facilities-based providers in any of the MSAs for which it seeks forbearance.

Market Segment Analysis. The Commission has previously found that the best method of analyzing a forbearance request is to conduct a product-specific analysis, including separate analyses by loop type²³ and by determining the extent to which competitors can provide services that are “substitutes” for such individual services, *e.g.*, DS0, DS1 and DS3 services.²⁴ In both the *Omaha Order* and *Anchorage Order*, despite these findings, the Commission relied on measures of competitive entry that looked at conflated product markets in the aggregate and ignored significant distinctions between them.²⁵ In both decisions, the Commission relied on aggregate information concerning cable coverage for residential and business customers.²⁶ Aggregate data across product markets offers no basis for granting forbearance because competition and facilities coverage varies between product markets even within a single wire center. Relying on aggregate information that cuts across all market segments and capacity levels carries a high risk of erroneous findings of the extent to which Qwest faces independent facilities-based competition. Most importantly, the level of competitive supply of independent loops and transport will vary according to the capacity of facilities. Accordingly, to adequately “determine “the extent to

²³ *Anchorage Order*, ¶ 13.

²⁴ *Omaha Order*, ¶ 65.

²⁵ *Omaha Order*, ¶¶ 65-72; *Anchorage Order*, ¶ 27-38. In *Anchorage*, the Commission did not consider specific substitutes to ACS’s high-capacity services because there was “limited demand” for such services in the *Anchorage market*. *Anchorage Order*, ¶ 36.

²⁶ *Omaha Order*, ¶ 69; *Anchorage Order*, ¶ 21.

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which ... forbearance will enhance competition”²⁷ the Commission must conduct a separate analysis of the extent to which forbearance would impact competition for each market segment, *i.e.*, mass market, SME, and enterprise, and for each transport or “loop type”, *i.e.*, DS0, DS1 and DS3.²⁸

With respect to business customers, it is particularly important that the Commission separately analyze the SME business market segment. BOCs have not provided, and are not able to provide efficiently, a level of attention and quality of service that best serves SME business customers. CLECs, on the other hand, are able to provide these customers service features, quality, and customer care levels that BOCs are only motivated and able to provide to their largest customers. Marketing differences, customer size, capacities of service, and customer needs qualify the SME as a separate market segment. These differences, in turn, require separate consideration with respect to the SME market of each of the factors that the Commission may consider in its forbearance analysis.

There is a long list of CLECs that focus exclusively on the SME market segment, as distinct from the mass market. Because they rely heavily on UNEs and provide customers a quality and level of service at affordable prices that BOCs are not able to provide , the impact of an erroneous, overbroad forbearance decision would be particularly harmful to competition and consumers in this specific market segment. Section 10(b)'s requirement that the Commission

²⁷ 47 U.S.C. § 160(b).

²⁸ *TRRO*, ¶ 210.

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consider whether forbearance would promote competition mandates that the Commission conduct a separate forbearance analysis for the SME market in addition to other market segments. An analysis along the lines of *Omaha* and *Anchorage* that assumes that some facilities coverage in a wire center applies to all market segments thwarts forbearance standards.

Proven Extensive Independent Last Mile “Coverage.” The telecommunications industry is characterized by extremely high barriers to entry which include high fixed and sunk costs, network effects, and economies of scale.²⁹ A competitor will be able to compete for customers with the ILEC³⁰ only if it has invested a substantial amount of its own resources to overcome these high barriers to entry and can use its own network to support last mile coverage so that “all of the customers capable of being served by [the ILEC] from [a] wire center will benefit from competitive rates.”³¹

In both the *Omaha* and *Anchorage Orders*, the Commission granted forbearance only in areas in which at least one competitor was offering its own extensive last mile facilities, finding that granting forbearance in areas, “where no competitive carrier has constructed substantial competing ‘last mile’ facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition.”³²

²⁹ See, e.g., *TRO*, ¶¶ 85-91; *Anchorage Order*, ¶ 31.

³⁰ *Anchorage Order*, ¶ 31.

³¹ *Omaha Order*, ¶ 69.

³² *Omaha Order*, ¶¶ 59-60; see also *Anchorage Order*, ¶ 31.

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In determining whether there is substantial competition within last mile facilities, the Commission must look to see if any intermodal competitor, “uses its own network, including its own loop facilities, through which it is willing, and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC’s local service offerings.”³³ A showing of competitive investment in last mile facilities alone is not enough to justify forbearance of the requirements of Section 10. There must also be evidence that the competitor is winning market share and is actually providing services over its own network to customers.³⁴

Under this standard, showings of competition based on use of Qwest facilities cannot justify forbearance. As the Commission has previously found, despite the seeming appearance of competition within a wire center, if those competitors are reliant on an ILECs wholesale components, competition does not truly exist.³⁵

Accordingly, the Commission must conduct its forbearance analysis of the Qwest Petitions in a manner that will ensure that facilities-based competitor’s end user connections, or last-mile “coverage,” is ubiquitous enough to allow competition to exist in the relevant wire centers even if Qwest is relieved of its unbundling obligations. A pervasive flaw in Qwest’s Petitions is that they rely primarily on the existence of competitors that continue to depend on Qwest last

³³ *Omaha Order*, n.156; *see also Anchorage Order*, ¶ 32.

³⁴ *Omaha Order*, ¶ 64, n.177; ¶ 69, *Anchorage Order*, ¶ 28.

³⁵ *Anchorage Order*, ¶ 30; *Omaha Order*, n.105.

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mile connections to reach customers. Qwest cannot show the existence of ubiquitous independent last mile connections, because for the vast majority of locations they do not exist.

A Viable Wholesale Market. The Commission must not only examine the status of competition in the retail market, but also the role of the wholesale market at the wire center level.³⁶ The Commission found in the *Omaha Order* that facilities-based wholesale competition “minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct.”³⁷ The Commission must find that sufficient competition exists to ensure that the ILEC will continue to offer loops and transport that competitors may not duplicate at wholesale on terms and conditions that will permit competition. The record must support the conclusion that the ILEC has “very strong market incentives” to continue offering loops and transport on a wholesale basis to competitors on reasonable terms and conditions that would permit competition despite the elimination of UNEs.³⁸ This very strong incentive will not exist unless there is an independent facilities-based provider of loops that could absorb retail customers that could migrate off Qwest’s network if Qwest fails to make reasonable wholesale offerings.³⁹ Without such a competitive showing, and in the absence of the regulatory necessity to do so, there is no incentive for Qwest to offer its own last mile facilities at competitive rates and terms—as has already been

³⁶ *Anchorage Order*, ¶ 10.

³⁷ *Omaha Order*, ¶ 71.

³⁸ *Omaha Order*, ¶ 81; *Anchorage Order*, ¶¶ 39-42.

³⁹ *Omaha Order*, ¶ 81.

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proven in Omaha.⁴⁰ In this case, because Qwest has not shown significant independent facilities-based competition for DS0, DS1 and DS3 services, the Commission cannot find that Qwest has strong incentives to make reasonable wholesale offerings. In addition, the Commission's "predictive judgment" in the *Omaha Order* that Qwest would make reasonable wholesale offerings in that MSA has proven erroneous.

IV. QWEST'S PETITIONS FAIL TO SHOW A COMPETITIVE MARKET SUFFICIENT TO JUSTIFY FORBEARANCE

Qwest's Petitions must be denied because its showing of competition is so internally inconsistent, unexplained, incomplete, and fails to meet forbearance standards in numerous respects that it would be impossible for the Commission to conclude that Qwest has met the thresholds for forbearance established in the *Omaha Order* and followed in the *Anchorage Order* - loss of **** Begin Confidential % End Confidential **** market share and 75% "coverage" by - an independent facilities-based provider.⁴¹ As shown in Section V of this Opposition, independent evidence contradicts and invalidates Qwest's showing of competition in any event.

A. Qwest's Overall Approach Is Incoherent

Rather than provide cable company market penetration in the telecommunications market for each of the MSAs impacted by its petitions - which the Commission considered in its *Omaha* and *Anchorage Orders*,⁴² Qwest attempts to show competition using a crazy quilt of inconsistent

⁴⁰ McLeodUSA Petition for Modification at 4-12.

⁴¹ *Omaha Order*, ¶ 28.

⁴² *Omaha Order*, ¶ 66; *Anchorage Order*, ¶ 28.

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methodologies and approaches that precludes any findings about competition in the MSAs. Qwest uses “communications connections,”⁴³ an approach invented by a consultant, to show Qwest’s share of the residential market, but uses revenue share based on a customer survey by the same consultant to estimate its share of the enterprise market.⁴⁴ When it comes to estimating the level of competition provided by CLECs, Qwest discards “connections” and revenues in favor of lines, this time estimated based on yet another methodology -- projections from its own white pages listings. For competition provided by competitors using special access Qwest shifts again, this time to voice grade equivalents. Competitive fiber is estimated not by lines, connections, or revenues, but route miles. For wireless service, Qwest jettisons all the previous methodologies and relies in part on the number of “adults” that have “cut the cord.”

Although the test adopted by the Commission in the *Omaha Order* for forbearance from unbundling obligations was “coverage” by an independent facilities-based provider, Qwest offers a “little bit of this, little bit of that” approach that includes everything *but* a consistent and complete approach that could possibly create a basis for making any findings concerning market share or wire center “coverage.” Significantly, Qwest has not attempted to explain why it jumps from one methodology and level of data to another or why it has not provided the simple information that the *Omaha Order* requires. The answer is that Qwest is picking and choosing

⁴³ Denver Petition at 18; Minneapolis Petition at 19; Phoenix Petition at 18; Seattle Petition at 19.

⁴⁴ Denver Petition at 27; Minneapolis Petition at 28; Phoenix Petition at 28; Seattle Petition at 27.